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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

NORTHEAST BANCORP, INC., UNION TRUST COMPANY and CITICORP,
Petitioners,

—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent,

—and—

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF ON THE MERITS FOR PETITIONERS

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I.
Introduction

The issues before the Court are sharply framed: Have respondents demonstrated that the Douglas Amendment unmistakably grants groups of states authority to pick and choose among sister states when conferring the valuable right of full-service interstate banking? And may the requirement that Congress "consent" to multi-state agreements be avoided on the theory that the New England Compact is too inconsequential to the federal union to require congressional approval? In addressing these dispositive issues, respondents fail to come to grips with the legislative and economic realities that dictate the outcome in this case.

A. Foremost among the deficiencies in respondents' argument is their failure to recognize the fundamental differences between congressional regulation of the nation's banking system and regulation by groups of states seeking to superimpose their own economic policy on broad sectors of the nation. Far from granting the states *carte blanche* authority to restructure the nation's banking system along regional lines, Congress established a system divided along state lines, except as each state acting by itself might adopt constitutional legislation permitting out-of-state institutions to enter its territory.

By adopting regional banking laws, Massachusetts, Connecticut and Rhode Island have joined together to create an exclusionary, multi-state banking region with economic consequences far different from those envisioned by Congress in 1956. And while respondents seek to dignify those discriminatory laws with the rhetoric of "states' rights," that concept provides no support for the arrangement they defend. In fact, respondents' theory would strip away the bedrock of states' rights: the *equality* of the states in the Union. Congress alone has authority to regulate commerce in a manner that injures the economic interests of any state, and Congress nowhere has given coalitions of states authority selectively to benefit or harm commerce from sister states.

Respondents ask this Court to infer, from general statutory language, authorization by Congress of regional favor-

itism that the Founding Fathers believed to be utterly incompatible with the existence of a federal union of co-equal states. The constitution forged this country into one nation, not a loose federation of states empowered to enter into parochial commercial alliances.

B. It is beyond question, as the Board found, that the statutes at issue are "discriminatory" in their purpose and effect (Pet. App. A58): they "selectively confer benefits on one or more other states and deny these same benefits to still other states" (*id.* at A56; Conn. Br. 19). As the evidence before the Board established, the statutes "create a kind of 'common market' for interstate banking that benefits some banking institutions in New England and penalizes banking institutions in the excluded states" (Pet. App. A218). As a result,

> "the Connecticut and Massachusetts legislatures, acting in concert, have decided that certain banking institutions will grow faster than would otherwise have been possible, while certain other institutions will grow more slowly, . . . the distinction being solely whether they are located within or outside of the protective geographic area." *Id.* at A219.

The adverse economic consequences for the excluded states are manifest: "Whenever any group of states decides to set up a common market and exclude some states from that market, the effect will be to penalize the business concerns in the excluded states. This in turn must have an adverse impact on the economic development of the excluded states." *Id.* That point is fully explained by the State of New York in its *amicus* brief.

The State of New York is now flanked on the East by an exclusionary common market erected in New England; simultaneously it is threatened by the erection of a new exclusionary mid-Atlantic market, which would embrace contiguous states lying to the South. *See* Citicorp Br. 6 (map). Other regionally exclusive confederations are now partitioning the United States banking market along regional lines, and all of the new confederations exclude the same money center states. Thus, this Court now

has before it " 'a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause.' " *Great Atlantic & Pacific Tea Co.* v. *Cottrell,* 424 U.S. 366, 380 (1976). While it may be common for foreign countries to confer "most favored nation" trading rights on their allies while boycotting commerce from hostile nations, we know of no precedent for the states of the union to treat each other in such a manner. Far from increasing the flow of interstate commerce, such discriminatory practices would open "the door . . . to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation." *Baldwin* v. *G.A.F. Seelig, Inc.,* 294 U.S. 511, 522 (1935). It is against this economic background that the Court should evaluate respondents' argument that Congress clearly intended to validate such divisive state legislation—without a single reference to discrimination, concerted or otherwise, against disfavored sister states either in the Douglas Amendment or in its legislative history.

C. In addition to economic reality, it also is essential to consider political reality in 1956. The Congress that passed the Douglas Amendment never received any notice that the Amendment could be invoked to justify preferential trade zones, destructive of fundamental constitutional values. Respondents have not succeeded in identifying a single statement, in the statute or its history, which indicates that Congress actually considered the enormously important policy issues raised by state regional banking laws. Did Congress really mean to give combinations of states unsupervised power to curtail the competitive position of banking institutions in disfavored states by discriminatory multi-state boycotts? Did it consider and respond to the protests of disfavored states excluded from such arrangements? Not a word about this subject is mentioned.

To find implicit "consent" in this situation would violate the most fundamental principles of representative government. As the Senators and Representatives from the State of New York have explained in their *amicus* brief: "Congressmen lacking any notice that proposed legislation would countenance discrimination otherwise violative of

the Commerce Clause would not be able to . . . protest and debate proposed discriminatory legislation." *Id.* at 18.

Beyond this, Congress believed that it was curtailing regional bank acquisitions and it intended to treat each state alike, with no trace of favoritism. The Congressmen who voted for this measure would surely be astonished to see it invoked today to support the dramatic growth of regional banking through multi-state arrangements that blatantly discriminate against the economies of boycotted states.

D. Respondents' arguments also must be evaluated in light of current political reality. As the Board repeatedly has stated, "the public policy issues that are raised by the regional approach are inherently national" and should be "resolved by Congressional action" (Pet. App. A48). Thus, "if Congress wishes to support these regional arrangements, appropriately limited to a transitional period, legislation explicitly authorizing that approach should be enacted" (Pet. App. A199; *see also id.* at A204).

Recognizing that current law does not address the complex policy issues raised by groups of states enacting discriminatory regional statutes, proponents of such statutes submitted bills in Congress in 1983 and 1984 that would have authorized them. Those proposals were followed by many days of public hearings, based on explicit notice that the legislation would permit concerted regional discrimination. S. 2851, 98th Cong., 2d Sess., Title X, Sec. 1003, would have amended the Douglas Amendment to permit interstate bank acquisitions "on the basis of the location of the States involved." The purpose of the bill was clearly stated: To "remove[ ] constitutional impediments under the commerce and compact clauses for state statutes already enacted and to be enacted in the future of the kind described in sections 1002 and 1003 of the bill." S. Rep. No. 98-560, 98th Cong., 2d Sess. 49 (1984).

The House refused to enact S. 2851. Chairman Rodino explained that regional banking proposals raise serious unresolved issues of law and policy: "regional banking compacts designed to promote the interests of certain banks within particular regions at the expense of other financial institutions in the rest of the country may significantly

undermine the rationale of the Commerce Clause, which was designed to eradicate internal trade barriers and prevent States from aligning themselves into rival economic coalitions. If this were, in fact, the unfortunate outcome of Title X, such might invite retaliation by States in excluded regions of the country" (Pet. Reply Br. A2-A3).

In recognition of these substantial policy concerns, Congress currently is considering several bills dealing specifically with regional banking that contain a variety of ameliorative provisions that attempt to mitigate injury to excluded states. For example, H.R. 1276, 99th Cong., 1st Sess., § 3 (Feb. 26, 1985), would allow regional banking limited strictly to a "three-year period." Moreover, institutions from "contiguous" states would be guaranteed entry into any regional compact.

Thus, Congress is now, for the first time, grappling with the policy issues raised by state-prescribed regional banking. It is sheer fantasy to suggest, as respondents do, that Congress resolved these issues thirty years ago without a word of discussion on the subject. To *imply* "consent" from the generalized language of the Douglas Amendment would moot the policy debate before Congress and write into federal law a proposal that Congress has refused to enact.

II.

Respondents Have Failed to Establish by Unmistakable Evidence That the Douglas Amendment Authorizes the States to Enact Interlocking Banking Laws That Discriminate on a Geographical Basis.

While this Court's decisions require respondents to establish unmistakable congressional authorization of legislation violative of the Commerce Clause, respondents have failed to produce even ambiguous evidence of such authorization.

A. In a brief that the Federal Reserve Board has not signed, the Solicitor General argues that the "literal text" of the Douglas Amendment authorizes groups of states to pick and choose among their sister states when granting entry (pp. 10-15). Quoting phrases from the Douglas Amendment, the Solicitor General reasons that Congress

validated *any* "statute laws" that "specifically authoriz[e]" the acquisition of a state bank by an "out-of-state bank holding company," no matter how irrational and discriminatory.

But under this Court's decisions, it is not enough that Congress authorized the states to adopt legislation dealing with interstate commerce. It is respondents' burden to show unmistakably that "Congress affirmatively contemplated *otherwise invalid* state legislation." *South Central Timber Development, Inc.* v. *Wunnicke,* — U.S. —, 104 S. Ct. 2237, 2241-42 (1984) (emphasis supplied). Thus, respondents must show "an affirmative grant of power to the states to burden interstate commerce 'in a manner which would otherwise not be permissible.' " *New England Power Co.* v. *New Hampshire,* 455 U.S. 331, 341, 343 (1982). It is *not* sufficient that Congress contemplated the enactment of state laws regulating commerce, or deferred to such laws, because such deference does "not indicate that Congress wished to remove federal constitutional constraints on such laws. The negative implications of the Commerce Clause . . . are ingredients of the *valid* state law to which Congress deferred." *Sporhase* v. *Nebraska,* 458 U.S. 941, 960 (1982) (emphasis in original).

Thus, the Solicitor General's "literal text" argument merely begs the question before the Court: did Congress mean to defer to *invalid* state law? Under *Sporhase, New England Power* and *Wunnicke,* the controlling presumption is that Congress meant to defer *only* to state law that operates in compliance with fundamental constitutional precepts.

The Solicitor General attempts to escape the teaching of *Sporhase* by arguing that, in the present case, Congress has "expressly invite[d] the states to involve themselves in the regulation of interstate commerce" (pp. 11-12). But that also was true in *Sporhase,* which considered federal legislation that approved a host of multi-state compacts regulating interstate commerce and manifested "purposeful and continued deference to state water law by Congress." 458 U.S. 959-60 & n.19. Those federal statutes not only preserved state laws, but also provided in the broadest terms that a federal regulatory agency, "in carrying out the provisions of this Act, shall proceed in conformity with such

laws." *Id.* at 959. This language is at least as broad as the Douglas Amendment, which enables the Board to approve interstate bank acquisitions pursuant to applicable state law.

If there were any doubt about the relevance of the principles announced in *Sporhase* to the present controversy, this Court's recent decision in *Bacchus Imports, Ltd.* v. *Dias,* — U.S. —, 104 S. Ct. 3049 (1984), removed it. In that case, the Court held that even a federal constitutional provision according the states plenary regulatory power over an area of commerce cannot be construed to displace the Commerce Clause prohibition of state discrimination in favor of local industry. The Twenty-First Amendment provides that "transportation or importation into any State . . . of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." Even though its sponsor said that this Amendment was intended to give "the States . . . absolute control over interstate commerce affecting intoxicating liquors" (*id.* at 3057-58), that unqualified statement of intent—which far exceeds any statement of intent concerning the Douglas Amendment—was held not to constitute a waiver of the protections of the Commerce Clause. The Court in *Bacchus* observed that reliance on broad grants of authority to the states as a waiver of the Commerce Clause is " 'an absurd oversimplification' " (*id.* at 3058), and struck down the discriminatory state legislation.

The inappropriateness of relying on congressional deference to state law as a relinquishment of Commerce Clause protections is well illustrated by the present case. Under the Solicitor General's sweeping theory, any manner of discriminatory alignment of states could be supported. The Northern states would be free to establish an interstate banking system that excludes bank holding companies located below the Mason-Dixon line. Likewise, a coalition of forty-nine states, fearing the competitive prowess of New York institutions, would be perfectly free to pass protectionist statutes freezing out New York while allowing unlimited acquisitions among themselves. These examples are, in principle, no different from the illicit type of balkan-

ization occuring across the United States under existing and proposed regional banking laws.

An additional reason for dismissing the Solicitor General's "literal text" theory is that the Board correctly found that the "Douglas Amendment does not appear *on its face* to authorize discrimination by Connecticut . . . and other New England states . . . against all other states." The Board also found that the "general" language of the Douglas Amendment "does not appear to meet the stringent test of explicitness laid down by the Supreme Court" (Pet. App. A65) (emphasis in original).

B. The private respondents rely on an even more nebulous source of purported congressional authorization. In their view, the fact that Congress has "balkanized" the banking market by generally prohibiting interstate bank acquisitions is a license for these states to partition the nation along regional lines, even if those lines are totally different from the lines prescribed by Congress (BNE Br. 11-16).

Respondents' argument boils down to this: Under traditional Commerce Clause principles, the states of the union must "swim together." But Congress has allowed them to swim separately. Therefore, it is perfectly proper for a group of states to join together to push another state under water. Not surprisingly, this line of argument clashes with settled legal principles.

As the Court explained in *H.P. Hood & Sons, Inc.* v. *Du Mond,* 336 U.S. 525, 543 (1949), "[i]t is . . . a quite different thing if Congress . . . finds such restrictions upon interstate commerce advance the national welfare, than if a locality is held free to impose them . . . ." Accordingly, this Court has held that even discrimination mandated by federal statute, which is identical to the discrimination sought to be imposed by the states, cannot be viewed as an expression of congressional intent to permit the states to balkanize the market. *Wunnicke,* 104 S. Ct. at 2243: "The fact that the state policy in this case appears to be consistent with federal policy—or even that state policy furthers the goals we might believe that Congress had in mind—is an insufficient indicium of congressional intent."

The "balkanization" that Congress imposed under the Douglas Amendment bears no relationship to the balkanization thrust upon the nation by the New England arrangement. Congress deliberately drew boundary lines at the state borders, not regional lines embracing several states. In so doing, it treated each state alike, neither discriminating against nor preferring any jurisdiction. By contrast, the New England states have, by their own action and without consent of Congress, created a multi-state common market that is open to only some states and is designed to allow regional companies to prosper at the expense of their rivals in excluded states. The New England statutes thus raise questions of policy concerning competition, concentration of resources and federalism far removed from those addressed by Congress in 1956.

It is equally unavailing for respondents to argue that the discrimination at issue is "not the creation" of the states, but is only the "residue of the congressionally-imposed discrimination that those states have refused to dissipate" (BNE Br. 28-29). Connecticut and Massachusetts have deliberately enacted statutes that extend immensely important economic benefits to institutions in preferred states, while denying those same benefits to institutions in excluded states—a discrimination based solely on geography. *See* Conn. Br. 19 (asserting that Connecticut was "justified in excluding New York"). Connecticut goes even further, imposing the penalty of divestiture on any holding company that acquires a bank outside of New England. By contrast, Congress treated all states alike, and merely gave each the ability to "permit expansion of banking across state lines where it otherwise would be federally prohibited." *Lewis* v. *BT Investment Managers, Inc.,* 447 U.S. 27, 47 (1980). That the New England states have chosen to exceed their authority by jointly lifting the federal ban for some states but not for others is a clear demonstration that the states, and not Congress, have imposed the forbidden discriminatory burden. *See Bacchus Imports,* 104 S. Ct. at 3057: "Virtually every discriminatory statute allocates benefits or burdens unequally. . . . The determination of

constitutionality does not depend upon whether one focuses upon the benefited or the burdened party."

C. The vain search for unmistakable evidence of congressional intent to permit joint discrimination among states otherwise violative of the Commerce Clause has forced respondents to engage in far-ranging speculation based on irrelevant fragments from the floor debates. Never, we submit, has so little been relied on to prove so much.

The Board correctly found that "[t]he Douglas Amendment was proposed during the debate on the Senate Floor and there is no committee or other significant legislative history to clarify its meaning. There was very little dicussion of the power of the states to override the interstate banking ban imposed by the Douglas Amendment *and no discussion of the power of the states to discriminate among potential out-of-state entrants*" (Pet. App. A66) (emphasis supplied).

Respondents nevertheless rely heavily on the statement of Senator Douglas that his amendment would permit interstate expansion "only to the degree permitted by State laws" (BNE Br. 11, 18). However, this is nothing but a recognition that the Douglas Amendment would allow interstate expansion to the "degree" that the fifty states adopted "laws" permitting expansion; that is, that the amount of interstate banking would depend on the *number* of states that lifted the federal ban. He nowhere expressed the view that the states would have a license to lift the ban "partially" by permitting some states to enter and excluding others. And he certainly made no reference to multi-state regional compacts discriminating against boycotted states.

Respondents also argue that Senator Douglas' reference to the McFadden Act as an analogue to the Douglas Amendment means that states are free to discriminate among banking institutions based solely on geography (BNE Br. 20). But the McFadden Act only serves to reinforce petitioners' interpretation. As all parties agree, that Act was designed to give states control over branching within their own borders, and to give federal and state banks the same ability to branch. The McFadden Act thus serves to guarantee competitive equality, and demonstrates

that Congress meant to give the states authority over internal branching policy—not regional affairs.

Respondents' strained attempt to rely on statements of Senator Bennett concerning the Douglas Amendment are equally unavailing (SG Br. 18; BNE Br. 13-14, 29 n.89). Senator Bennett, who opposed the Douglas Amendment, envisioned that the states would be empowered to "correct" federal discrimination—not substitute an altogether new discriminatory policy inconsistent with the equal status of the states.

Finally, the passing references to "states' rights" and the "discretion" of the states that respondents cite (BNE Br. 17, 20) lend no support to their contention that Congress authorized joint geographic discrimination. Respondents do not cite any evidence that unmistakably shows that a Congress concerned about "states' rights" meant to give unbridled power to groups of states to boycott disfavored states without any federal supervision, or that Congress intended to abandon the traditional principle that discretion must be exercised within constitutional bounds.

While the Solicitor General *now* professes to see the same meaning in these fragments of legislative history that the private respondents see, he contradicts not only his client, the Board, but also his own position at the certiorari stage. The Solicitor General then correctly stated that "there was no congressional discussion of the specific types of action that the states might or might not take under the Douglas Amendment" (SG Br. in Opp. 6). *Accord Iowa Independent Bankers* v. *Board of Governors,* 511 F.2d 1288, 1296 (D.C. Cir. 1975).

D. Respondents also argue that the existence of certain other state laws governing interstate bank acquisitions somehow impairs petitioners' contention that the Connecticut and Massachusetts statutes are unconstitutional (BNE Br. 22-26; SG Br. 21-24). The other laws cited by respondents govern interstate bank acquisitions pursuant to criteria that do not discriminate on the basis of geography. Whether these very different types of laws are constitutional is completely immaterial here.

Moreover, while respondents attempt to argue that these geographically neutral statutes have a discriminatory effect because in-state companies are preferred to out-of-state companies, they conveniently overlook the fact that *that* consequence is imposed by Congress, and not by the states. Those states have simply lifted the federal ban on a geographically neutral basis. They have not attempted to superimpose their own brand of geographical discrimination in conflict with the pattern prescribed by Congress, as the New England states here have done.

None of the other statutes cited by respondents has ever been tested under the Commerce Clause. If such a case were to arise, it is likely that a court would apply the balancing test used to determine the lawfulness of even-handed state regulation. That approach is not permissible here, however, because the Connecticut and Massachusetts statutes *themselves* inflict geographical discrimination. *See Milk Control Board* v. *Eisenberg Farm Products,* 306 U.S. 346, 351 (1939) ("The United States could not exist as a nation if each of them were to have the power to . . . discriminate as between neighboring states in admitting articles produced therein"); *Brimmer* v. *Rebman,* 138 U.S. 78, 82 (1891) (States "may not . . . make discriminations against the products and industries of some of the states in favor of the products and industries . . . of other States").

E. Finally, respondents argue that the Board's views are entitled to judicial deference (SG Br. 24-25; BNE Br. 9 n.29). In making this argument, respondents fail to mention that the Board rejected the essential premise of their position—finding that the Douglas Amendment does "not appear on its face to authorize discrimination," and that the legislative history contains "no discussion of the power of the states to discriminate against potential out-of-state entrants" (Pet. App. A65, A66).

There is, moreover, no basis for deferring to the Board's unsupportable assertion that the Douglas Amendment constitutes a "renunciation of federal interest in regulating the interstate acquisition of banks" (*id.* at A52). The host of federal statutes and policies applicable to interstate bank

acquisitions shows that this is an erroneous overstatement. *See Lewis,* 447 U.S. at 38 & n.7. Moreover, even if Congress "renounced" its interest to the extent of deferring completely to state law, that would not show that Congress meant to waive the protections of the Commerce Clause. For when Congress defers to state law, it is presumed that it defers to "*valid* state law." *Sporhase,* 458 U.S. at 960 (emphasis in original).

III.

Respondents Have Raised No Valid Ground for Dispensing With the Unmistakable Evidence Test Here.

Respondents argue that this Court's Commerce Clause decisions, which require them to adduce unmistakable evidence of intent to permit action otherwise violative of the Commerce Clause, are "inapposite" because Congress "itself has rejected the premise of national economic unity." *See* BNE Br. 27-32; *see also* SG Br. 15. Their theory appears to be that because Congress has regulated the banking system in one way to serve a national purpose, individual states, or groups of states, are free to superimpose any divergent form of regulation they choose, no matter how discriminatory, irrational and harmful to other states. This argument is devoid of merit.

There is nothing unusual about the federal government's "balkanizing" part of the economy and, nonetheless, requiring the states to make any additional regulation of their own conform to Commerce Clause standards. For example, in *Bacchus Imports,* 104 S. Ct. at 3057-59, even though a constitutional amendment had balkanized the market by giving plenary effect to state laws forbidding the importation of liquor, ordinary Commerce Clause principles proscribing local protectionism and geographical discrimination remained fully intact. The Court explained that "because the [challenged state law] violates a central tenet of the Commerce Clause but is not supported by any clear concern of the Twenty-First Amendment, we reject the States' . . . claim based on the Amendment." Similarly, in the present case, regional boycotts against disfavored sister states do not serve "any clear concern" of the Douglas

Amendment. And in view of the strong federal interest in effectuating the non-discrimination mandate of the Commerce Clause, that mandate is fully applicable here. *Accord Wunnicke,* 104 S. Ct. at 2243.

Thus, congressional regulation of a market—even in a discriminatory manner—does not implicitly authorize the states to superimpose their own divergent regulatory scheme. When Congress acts under the Commerce Clause, representatives from burdened states participate in a "collective decision" to permit the particular form of regulation. By contrast, when a group of states act in their own parochial self-interest to superimpose a different regime of regulation, there is a serious danger that "unrepresented interests will be adversely affected by restraints on commerce." *Wunnicke,* 104 S. Ct. at 2243.

Respondents also mistakenly suggest that petitioners rely on a "talismanic requirement" of specificity and cite *Prudential Ins. Co.* v. *Benjamin,* 328 U.S. 408, 430-31 (1946), and *Western & Southern Life Ins. Co.* v. *State Board of Equalization,* 451 U.S. 648, 653 (1981), in support of their claim (BNE Br. 30). The statute involved in those cases, the McCarran-Ferguson Act, provides in the clearest possible language that the entire business of insurance is "subject to the laws of the several states," and *expressly* lifts the negative implications of the dormant Commerce Clause: "silence on the part of the Congress shall not be construed to impose any barrier to the regulation . . . of such business by the several States." *Id.* at 429. This and other unambiguous language (*see* Pet. Reply Br. A4-A5), coupled with equally unambiguous legislative history, established that Congress, acting with "full knowledge" (328 U.S. at 430), had waived the protections of the Commerce Clause. There is no comparable evidence in the language or legislative history of the Douglas Amendment that the protections of the Commerce Clause have been waived.

Thus, *Prudential* and *Western* offer no support for respondents' claim in this case that Congress' "balkanization" of the banking industry implicitly validates discrimination by a group of states against sister states. The Solicitor General stated in his *amicus* brief in the *Wunnicke* case,

No. 82-1608, at 5-14, that "implicit approval" for states to discriminate against commerce cannot be derived from even "parallel" or "consistent" federal legislation, and explained that such a theory would be "particularly ill-suited" where Congress "has in fact given the subject . . . considerable attention, but has declined to take any action authorizing state regulation" of the type at issue. The same principle applies here, since Congress recently has focused on the subject of regional banking statutes and each time has refused to give its consent.

IV.

The Connecticut and Massachusetts Statutes Cannot Be Saved by Appeals to Preservation of Local Control Over Banking or Prevention of Concentration of Banking Resources.

Respondents further argue that the New England statutes are constitutional because they assertedly advance the federal policy of preserving "local control" over banking and prevent "undue concentration of banking resources" (BNE Br. 33-39; SG Br. 18-20; Conn. Br. 18). However, these statutes do not further either of these objectives and, in any event, cannot be saved by such an argument.

The statutes at issue here are designed for the very purpose of facilitating regional combinations of large banking institutions located far apart. The transactions at issue in this case make this point strikingly clear. Respondent CBT is the largest bank holding company in Connecticut, and its proposed merger partner, BNE, is the fourth largest banking organization in Massachusetts (Pet. App. A36). Respondent BBC is the largest commercial banking organization in all of New England, and it wishes to acquire the fourth largest banking organization in Connecticut (Pet. App. A80). Similarly, respondent HNC is the second largest banking organization in Connecticut, and it is seeking to combine with the eighth largest organization in Massachusetts (Pet. App. A72-A73).

Moreover, while the challenged statutes permit large regional combinations, New York institutions are frozen out,

regardless of their size or proximity to New England. As the *amicus* brief of the State of New York explains (pp. 2-3), "almost all of the banks in New York are the same size or smaller than the average banks located in Massachusetts and Connecticut." Indeed, as explained by the New York Bankers Association in its motion for leave to file its *amicus* brief, "[n]inety percent of the members of the Association are smaller than any of the respondent bank holding companies."

Thus, the New England statutes prescribe naked geographic criteria that exclude *all* banks in New York, while permitting large interstate combinations in New England without any pretense of preserving "local control" or avoiding undue concentration of banking resources. And they prevent Northeast, a Connecticut bank holding company of moderate size, from combining with a neighboring New York institution that is smaller than one of the private respondents. This case therefore presents an "impermissible classification based solely on residence." *Metropolitan Life Ins. Co.* v. *Ward,* No. 83-1274, slip. op. 13 (Mar. 26, 1985).

As the Board explained, these "discriminatory" laws were designed to protect New England banks from "having to compete with banks outside the region" (Pet. App. A58). In the words of one of the Connecticut legislators, the states are trying "to protect what's theirs that's within their own state" (Pet. App. A158). But instead of competing fairly on the merits with equal rules applicable to all participants, New England banks have obtained from their legislatures special interest legislation that gives them a "powerful competitive tool" withheld from institutions in excluded states such as New York (Pet. App. A219, A233-A237).

Furthermore, respondents' plea for protection against competition from New York holding companies ignores the fact that when new institutions enter a market, they do not eliminate their rivals; rather, they provide a new procompetitive presence beneficial to consumers. As Governor Rice has explained: "Survival is the result of providing good service at competitive prices and there is no evidence

that this is directly related to the size of the organization" (Pet. App. A203). *See also Edgar* v. *MITE Corp.*, 457 U.S. 624, 643 (1982).

In addition, it is important to recognize that the protectionist arguments advanced by respondents fly in the face of the purpose of the Equal Protection Clause. As the Court explained in *Metropolitan Life Ins. Co.*, slip op. at 12, "acceptance of [the State's] contention that promotion of domestic industry is always a legitimate state purpose under equal protection analysis would eviscerate the Equal Protection Clause in this context. A State's natural inclination frequently would be to prefer domestic business over foreign."

In view of these considerations, it is not surprising that respondents' "local control" and "concentration of resources" arguments were repudiated by this Court in *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. at 42-44. In that case, the Court held that it was contrary to the Commerce Clause to exclude "out-of-state holding companies" on a blanket geographic basis. The Court explained that the proponents of the discriminatory state laws had "demonstrated no basis for an inference that all out-of-state bank holding companies are likely to possess the evils of monopoly power." *Id.* at 43. The Court also rejected the argument that the discriminatory laws furthered "local control," observing that the laws do "not restrict out-of-state ownership of local bank holding companies." Moreover, the Court emphasized that such an argument is "at odds with the general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its citizens from outside competition." *Id.* at 44.

Finally, respondents' arguments about preserving local control and avoiding undue concentration of resources ignore the fact that Congress has delegated to the Board the duty to regulate these matters in every bank acquisition proceeding pursuant to federally-prescribed criteria. *See* Pet. App. A41-A48; 12 U.S.C. § 1842 (a), (c). Thus, it is completely contrary to the federal legislative scheme for groups of states to engage in unsupervised boycotts of institutions in other states for the purpose of "cutting those

institutions down to size." Congress declared that competition, concentration of resources, and service to local markets would be comprehensively scrutinized by the federal administrative agency charged with regulatory responsibilities, not rival coalitions of states acting in their own selfish interest.

V.

The New England Compact Requires Congressional Approval Because It Threatens Substantial Injury to the Federal Union.

Respondents cannot seriously contend that there is no multi-state agreement in this case. The virtually simultaneous adoption of these interlocking statutes, the prescription of the same regionally discriminatory criteria, and the joint deliberation that preceded the enactment of those laws, establish an agreement beyond question. Thus, respondents are forced to argue that the compact is of such insubstantial concern to the federal union that congressional supervision may be dispensed with here (SG Br. 25-30; BNE Br. 39-47). What we have said thus far is a sufficient answer to these contentions: the New England Compact is a direct assault on excluded states, particularly the State of New York. It poses a direct and substantial injury to a principal industry of that State, and to its economy. As Chairman Rodino has explained, such a compact, unsupervised by Congress, provokes "retaliation by States in excluded regions of the country," and therefore is a threat to the harmony of our federal union (Pet. Reply Br. A3).

The "equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized." *Coyle* v. *Oklahoma,* 221 U.S. 559, 580 (1911). Moreover, as we have demonstrated in our opening briefs, the discriminatory compact at issue in this case is precisely the kind of agreement for parochial advantage that the Founding Fathers intended to subject to congressional scrutiny under the Compact Clause. Respondents have not even addressed that controlling constitutional history. Accordingly, respondents' contentions merit only a brief response.

Respondents rely heavily on *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452 (1978) (SG Br. 25-31; BNE Br. 40-42). But that case, involving a non-discriminatory compact open to all states, is clearly distinguishable on its facts and supports petitioners' analysis for the reasons explained in our opening briefs.

Respondents also rely on the irrelevant fact that the New England Compact does not set up an administrative agency to oversee regional mergers (SG Br. 27; BNE Br. 40-43). But neither the Constitution nor any of this Court's decisions limits the requirement of congressional consent to the establishment of multi-state "agencies." They require consent to the consummation of any harmful multi-state "agreement," formal or informal.

Moreover, no administrative agency is needed because the boycott is self-executing: New England states are cut into the deal while states such as New York are cut out. Thus, regardless of the presence of a multi-state agency, congressional supervision must be exercised because the reciprocal New England statutes have a harmful impact on the economy of excluded states and are a potent source of discord in the federal system. *See* New York *amicus* brief (pp. 1-4). *See also Florida* v. *Georgia*, 58 U.S. (17 How.) 478, 494 (1855) ("This provision is obviously intended to guard the rights and interests of the other States, and to prevent any compact or agreement between any two States, which might affect injuriously the interests of the others").

Respondents also argue that this compact poses no threat to federal interests because a federal court would hold any inconsistent state law to be "preempted" (SG Br. 27; BNE Br. 43-44). That argument, however, would make the Compact Clause a superfluous restatement of the Supremacy Clause. Moreover, this Court's decisions, cited in our opening briefs, make it plain that even a *potential* inconsistency with federal policy is sufficient. The need to litigate "preemption" issues with state officials who may seek to hinder and delay interstate mergers of failing banks under 12 U.S.C. § 1823(f), and the substitution of multi-state boycotts for federal regulation of competition and resource concentration under federal criteria, are more than

sufficient to establish the requisite potential inconsistency. *See* "The Great Fall of Permanent," *New Haven Register* (Mar. 10, 1985) (*quoting* the Connecticut State Banking Commissioner: " 'A half dozen times I threatened Federal Home Loan Bank officials with a lawsuit if they tried to merge Permanent with an out-of-state institution.' ").

Respondents also claim that the New England Compact does not impair any state's sovereignty or sphere of authority (BNE Br. 44-45; SG Br. 29). This ignores the fact that injury to a state's economy is an injury to its sovereign rights. The multistate exclusionary arrangement at issue here is an assault on a principal industry of the principal excluded state—New York—and therefore is an undisguised attack on its economy. The constitution guarantees each sovereign state that no group of states will harm its economy without the supervision of the national legislature. *See Garcia* v. *Metropolitan Transit Authority*, — U.S. —, 53 U.S.L.W. 4135, 4141 (1985) ("sovereign interests" of the states are "protected by procedural safeguards" inherent in Congress' law-making functions). In this case, the excluded states have been seriously injured without being accorded the protection of Congress, and their sovereign rights have therefore been infringed.

Finally, respondents suggest that the injury suffered by excluded states is not strictly traceable to concerted action (BNE Br. 46-47; Mass. Br. 57). This argument is both irrelevant and erroneous. It is irrelevant because the Constitution requires congressional approval of *all* compacts potentially harmful to the welfare of excluded states. The argument is erroneous because the exclusive common market in this case—which allows regional companies to grow at the expense of their rivals in disfavored states—was conceived and created through concerted action. And the legislative history of the compact establishes that the states involved decided jointly to limit access to their common market. *See* Citicorp Br. 4-6, 32-33; Northeast Br. 4-5, 14-15.

CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

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